No. 100758-2

SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA PENNER, *ET AL.*

PLAINTIFFS-APPELLANTS,

VS.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY

AND

THE STATE OF WASHINGTON,

DEFENDANTS-RESPONDENTS.

APPELLANTS' OPENING BRIEF

Joel B. Ard, WSBA #40104
ARD LAW GROUP PLLC
P.O. Box 11633
Bainbridge Island, WA 98110
(206) 701-9243

David K. DeWolf, WSBA #10875
ALBRECHT LAW PLLC
5105 Third Ave., Suite 101
Spokane Valley, WA 99212
(509) 495-1246

Attorneys for Appellants JOSHUA PENNER, *et al*.

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I. INTRODUCTION

Joshua Penner and Todd McKellips appeal the trial court's dismissal of their claims against Central Puget Sound Regional Transportation Authority ("CPSRTA") and the State of Washington. Pierce County Superior Court ruled that Penner and McKellips were seeking a second bite of the apple, even though they had never taken even the first bite of the apple. The trial court accepted CPSRTA's argument—breathtaking in its novelty and audacity—that once a claim is brought asserting a "public right," any future litigant, regardless of whether he had been in privity with the previous party, would be bound by the judgment entered in the earlier case. Although the trial court also accepted additional arguments presented by CPSRTA, including similarly extravagant claims about the scope of the constitutional prohibition against the impairment of contracts, the prime issue for this court to decide is whether or not the due process rights of litigants will be drastically curtailed.

II. Assignments of Error

1. Did the Superior Court err in finding that Plaintiffs/Appellants were barred by principles of res judicata and/or collateral estoppel from litigating the issues in this case, even though they were never parties to, nor represented by a party to, the previous litigation?
2. Does Wash. Const. Art. I, § 23 (forbidding the impairment of contracts) automatically preclude any downward adjustment of tax rates or tax base valuation if tax revenue has been pledged to the repayment of bonds?
3. Is a municipal bond contract impaired by subsequent legislation reducing taxable valuations regardless of resulting revenue, debt service, and available contract remedies?
4. Does Art. I, § 23 operate to bar legislation that would be permissible under the federal constitution, Art. I, § 10?
5. Is CPSRTA entitled to the equitable remedy of the statute of limitations?

III. Statement of the Case

On June 25, 2021, Joshua Penner and Todd McKellips filed a complaint against CPSRTA on behalf of themselves and a class of similarly situated motor vehicle owners. The complaint alleged a set of constitutional infirmities in authorizing statutes flowing from the fact that CPSRTA had collected a motor vehicle excise tax ("MVET") based on valuation tables that are not authorized by statute. Both CPSRTA and the State—the two government entities responsible for collecting the MVET—claimed that they had been unable, for over a decade, to determine that they were using the wrong MVET schedule. Because the authorized schedule requires slightly higher vehicle valuations for certain newer vehicles, numerous statutes and public authorizing votes mis-stated the effect of CPSRTA's tax authorizations. Unbeknownst to CPSRTA[1], the State, and any

[1] That is, CPSRTA ***claims*** it did not know that it was not using the proper tables, a point of contention in the lawsuit.

citizen, several iterations of enabling legislation and tax-authorizing votes mis-stated the effect of new laws, which called for higher taxes without, for example, making the required disclosures of the increase. Plaintiffs also alleged that CPSRTA had knowingly concealed its non-compliance with the correct, higher MVET schedule, thus tolling any statute of limitations until the truth was revealed in September 2019.

Plaintiffs sought discovery of documents relevant to their claims, but were denied access to those documents pending CPSRTA's legal challenge to the plaintiffs' right to sue. CPSRTA claimed (1) *Black et al. v. Central Puget Sound Regional Transit Authority et al.,* 195 Wash. 2d 198 (2020) ("*Black I*"), was binding precedent foreclosing any of the claims challenging CPSRTA's use of its valuation tables; (2) A previous suit brought by Taylor Black et al., Pierce County No. 19-2-11073-8 ("*Black II*"), had res judicata and collateral estoppel effect, barring the suit brought by Penner and McKellips—even though

Penner and McKellips had never been a party to the suit brought in *Black II*; and (3) *Pierce County v. State*, 159 Wash. 2d 16 (2006) ("*Pierce County II*"), not only permitted, but actually required, CPSTA to continue collecting an MVET based on the valuation tables in use at the time it issued bonds to which the MVET revenue had been pledged. CPSRTA insisted that any legislation resulting in a reduction of the MVET valuation base is an unconstitutional impairment of contract, without regard for the actual effect on revenue or availability of contract remedies. CPSRTA takes this position despite its actual practice of collecting its MVET based on valuation tables that are ***lower*** than those required by the statutes it claims are in force, thereby giving a tax break to owners of the highest value vehicles (1 and 2 year old vehicles) instead of the (arguably) legislatively mandated reduction to owners of lower valued, older vehicles. It also takes this position without ever accounting for its concession that the Legislature can reduce the tax base for the sales tax pledged to

the same bonds by adding exemptions of products or services from the sales tax. On April 18, 2022, Superior Court Judge Susan Adams ruled in favor of CPSRTA, agreeing with each of CPSRTA's arguments. This appeal followed.

IV. ARGUMENT

A. Res Judicata and Collateral Estoppel Should Apply Only to Those Who Were Parties to a Previous Suit.

Res judicata and collateral estoppel differ in the scope of the preclusion. Whereas res judicata precludes not only relitigation of a prior claim, but also any claim that could or should have been brought in the previous action, collateral estoppel only applies to particular issues that were litigated in the previous case. *Scholz v. Washington State Patrol*, 3 Wash. App. 2d 584 (Div. 3 2018). Here, the trial judge held that claim preclusion (res judicata) and issue preclusion (collateral estoppel) applied to

bar the claims of Penner and McKellips, even though they had not been parties to *Black II*.[2]

CPSRTA advanced the novel theory that whenever there was "sufficient unity-of-interest"[3] between the current party and the parties to previous litigation, the rule of claim preclusion applies. It relied on a dramatic extension of the theory of "virtual representation," a theory applied to claim preclusion in a single case in Washington law, prior to the adoption of CR 23 and the development of class actions.

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[2] The trial court's order granting summary judgment did not distinguish the effect of res judicata from the effect of collateral estoppel. CP 1152 In this case there is no independent application of collateral estoppel compared with the effect of res judicata. In fact, both doctrines require an identity of parties before they can be applied. *Sprague v. Spokane Valley Fire Department,* 189 Wash. 2d 858 (2018) (collateral estoppel can only be applied to a party who was a party to the previous litigation or in privity with one who was). Consequently, if res judicata does not apply to Plaintiffs' claims, neither does collateral estoppel.

[3] CPSRTA Brief in support of Summary Judgment, 9:17, CP 734.

1. "Virtual representation" and res judicata cannot apply absent the due process protections of CR 23.

Res judicata has been applied only once in Washington where the court found that a party was "virtually represented" in a previous action. In a case that preceded the adoption of CR 23, *Fahrenwald v. Spokane Sav. Bank*, 179 Wash. 61 (1934), a group of shareholders sought to impose a trust on certain assets of the bank. The bank responded that a previous suit was brought seeking similar relief. The court held that the doctrine of "virtual representation" applied. "This doctrine involves an exception to the rule that all those interested and affected must be made parties and is applied when the representation is fair and the parties have a common interest before the court." *Fahrenwald*, 179 Wash. at 63. Because none of the procedural requirements of CR 23 were yet in place, the court felt free to make up its own procedure for what was effectively (in the ultimate outcome at least) a class action.

The United States Supreme Court has subsequently rejected such an approach, holding that a party is denied due process when the court deprives the party of his or her day in court by treating a case as a "common-law kind of class action." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (internal quote marks removed). "[V]irtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in *Hansberry, Richards,* and Rule 23." *Id.* Instead, said the Supreme Court, when the class action vehicle is available as a way to resolve a dispute involving multiple parties, the procedural protections of Rule 23 must be followed.

While the *Taylor* court rejected the generic "virtual representation" label, it recognized that res judicata can be applied to bar a subsequent, different litigant from re-opening a claim. It delineated only six limited, constrained ways in which a non-party could be bound by a prior decision: (1) agreement of

the parties to resolution of a "test case;" (2) "a variety of pre-existing substantive legal relationships . . . [which] originated as much from the needs of property law as from the values of preclusion by judgment," *Taylor*, 553 U.S. at 894; (3) class actions and suits by trustees, guardians and other fiduciaries; (4) suits in which the non-party seeking to re-litigate had assumed control of the prior suit; (5) litigation by an agent of a party bound by a prior judgment; and (6) specific statutory schemes such as bankruptcy, probate, and *quo warranto* actions. None of those exceptions apply here. In fact, CPSRTA made no effort to qualify this case under traditional *res judicata* jurisprudence, and even conceded that it could not meet the "virtual representation" test. *See* CPSRTA Reply i.s.o. Summary Judgment, CP 1000. Instead, it argued that a rule previously limited to cases brought by voters challenging an election or seeking recall of an elected official should be extended to any case involving a "public right."

CPSRTA relied on the rule of *In re Coday*, 158 Wash. 2d 485 (2006), arguing that whenever "public rights" were involved, the ordinary protections of due process—giving every litigant an opportunity to have its case heard by a competent tribunal—did not apply.[4] CPSRTA offered no limiting principle that would preserve the due process rights of groups or individuals who are neither parties to previous litigation nor virtually represented in such litigation. Nor did CPSRTA explain how those who would be affected by the outcome of a pending "public rights" case could avoid having their own claims foreclosed by an unfavorable outcome in the pending case.

2. Especially in the case of class action claims, res judicata should be carefully applied.

To apply res judicata, the court must find four elements, or types of identity, between the current action and the previous

[4] "[R]es judicata and collateral estoppel bar actions asserting claims, theories, or defenses, which assert public-rights [*sic*] and are only nominally separated by the identity of litigant pleading them." Reply Brief, 4:25-27, CP 1000.

action: there must be identity of (1) subject matter; (2) cause of action; (3) **persons or parties**; and (4) quality of persons. *Weaver v. City of Everett*, 194 Wash. 2d 464 (2019). There is clearly no identity of persons or parties between Taylor Black *et al.* and the plaintiffs here, Penner and McKellips.

"Res judicata should not be applied in a manner so that a party is deprived of his or her property rights without having his or her day in court." *Pederson v. Potter*, 103 Wash. App. 62, 74 n.1 (Div. 3 2000); *Meder v. CCME Corp.*, 7 Wash. App. 801, 804 (1972). The class action procedure is carefully prescribed to insure that an action brought by a plaintiff claiming to represent a class of others similarly situated does not automatically bind the other class members. If it were otherwise, those who would oppose the class action, or would opt out of it if certified, would be forced to intervene to avoid having their own claims foreclosed. Under CR 23, before the resolution of a claim has binding effect on other class members, the court must first

determine that the class representative is properly qualified to represent the other class members, and in most cases there must be notice to other class members permitting them to opt out of the class action to preserve their own right to a day in court. *Chan Health Care Group PS v. Liberty Mutual Fire Insurance Company and Liberty Mutual Insurance Company*, 192 Wash. 2d 516 (2018). The denial of certification of the class—or in this case, CPSRTA's choice to proceed to the merits of the case before certification of the class[5]—precludes any binding judgment against the other members of the putative class. It would ignore all of the procedural protections of CR 23 to effect a binding judgment in the way that the trial court did in this case.

[5] It is not reversible error for a trial court to hear dispositive motions on the merits before certification of the class. *Chavez v. Our Lady of Lourdes Hospital at Pasco*, 190 Wash. 2d 507 (2018). However, the rule applied by the trial court in this case treats such cases as though the class had already been certified, denying an opportunity for class members to challenge the certification or to opt out once the class had been certified.

Incredibly, CPSRTA seeks adoption of a new "heads I win, tails you lose" rule, in which it receives all the benefits of a class action without taking any of its risks. There can be little doubt that if it had suffered defeat on the merits, it would have demanded full and strict compliance with Rule 23 and would have fought vigorously before its liability was extended to all taxpayers.

3. The proposed expansion of res judicata would conflict with the fundamental principles of due process.

CPSRTA proposed, and the trial court adopted, a much broader application of res judicata than has ever before been recognized. The proposed rule would govern any case involving "public rights"—not just the unique case of voters challenging an elected official or the outcome of an election. Unlike cases brought by voters against elected officials, the defendant in a class action is not left defenseless against repeated challenges raising the same claims. A bedrock principle of due process is that litigants can only be barred from raising a claim when they have

either had a previous day in court, or were virtually represented in a previous action by a party with whom they could be said to be in privity. CPSRTA could have agreed in the previous litigation to class certification, which would have produced a judgment binding on all class members, including Penner and McKellips. They chose not to. They should not now be able to rely upon a rule fashioned for the unique circumstance of public officials who would otherwise be faced with repetitive lawsuits seeking the same remedy.

Neither the defendants nor the trial court have identified any limiting principle to this substantial erosion of the protections of due process, as the following section demonstrates.

4. The trial court's decision denies Penner and McKellips their due process rights.

"Neither the doctrine of res judicata nor collateral estoppel are intended to deny a litigant his day in court." *Luisi Truck Lines, Inc. v. Washington Utilities and Transp. Commission*,

72 Wash. 2d 887, 894 (1967). "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor*, 553 U.S. at 884 (internal quotations removed). At the same time, of course, once a litigant has had his or her day in court (his "one bite of the apple"), res judicata is properly applied to deny a second "bit of the apple." *Id.*

Here, however, neither Penner nor McKellips has had his day in court, and neither CPSRTA nor the trial judge contends otherwise. Instead, CPSRTA argued that a special principle created for and applied exclusively in election cases should be extended to this case and all cases in which "public rights" are involved—particularly cases challenging taxes. This court recently reaffirmed the narrow exception to the requirement of prior participation, namely those cases when a voter seeks relief against an elected official. In such cases the resolution of the

previous challenge is binding on other voters who raise similar challenges. *Matter of Recall of Fortney*, 503 P.3d 556 (2022), citing *In re Recall of Persall-Stipek*, 129 Wash. 2d 339 (1996). In the unique situation where successive challenges could be brought against the same elected official asserting the same charges, "we [the court] will not subject an elected official to answer the same charges each time a different citizen is willing to put their name on a recall petition." *Fortney*, 503 P.3d at 566. However, this principle has been limited to challenges against elected officials, who have no defense against successive lawsuits asserting identical claims.

If the unique circumstance of suits against elected officials is ignored, and the same rule is extended to bar suits by any litigant who has a "unity of interest" with a previous litigant, the bedrock right to due process—the "principle of general application"— will no longer apply.

B. Legislatures Retain the Freedom to Adjust Tax Rates or Base Valuations Under Both Contracts Clauses.

CPSRTA advanced a second justification for the court's dismissal of the claims brought by Penner and McKellips. The complaint alleged that CPSRTA was violating statutory requirements for how the MVET should be calculated. CPSRTA made a claim almost as breathtaking and novel as its claim with regard to the application of res judicata whenever a "public right" was litigated. CPSRTA claimed that the cases of *Pierce County II* and *Black I* announced a rule—one that the trial court in this case accepted—that the legislature was powerless to adopt legislation that could have the effect of reducing future tax revenue that it previously authorized, whenever such revenue had been pledged to the service of bonds that were still outstanding. CPSRTA also took the position that it had no obligation to challenge the constitutionality of such a statute, but could simply refuse to comply with it, as it now does.

In 2006, the legislature amended the valuation tables that are used to calculate the MVET that CPSRTA collects. RCW 82.44.035. CPSRTA has never challenged this statute as an impairment of contract. Instead, CPSRTA simply asserts (claiming the authority of *Pierce County II* and *Black I*) that because adoption of the new valuation schedule would result in a reduction in revenue,[6] "the Contracts Clause of the Washington Constitution requires Sound Transit's continued use of the Referendum 49 Schedule until Sound Transit's bonds are retired." CPSRTA Brief iso SJ, 11:5-7, CP 736.[7]

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[6] RCW 82.44.035 generally provides for a lower valuation of vehicles compared to the previous valuation schedule in use before 2006. However, there is no evidence in the record to show that the altered schedules would reduce revenue, or by how much, or as compared to what baseline. CPSRTA appears to rely on a particular set of economic assumptions about taxpayer behavior, but has not produced any documents to support its revenue claims.

[7] CPSRTA does not use the Ref. 49 schedules, but instead applies a different, slightly lower valuation schedule that is not approved for its use by any statute.

In other words, according to CPSRTA, because it chose to pledge the revenue collected pursuant to previous legislative authority to the service of outstanding bonds, CPSRTA was effectively immune from any legislative adjustments to the way in which the property subject to the MVET was valued. CPSRTA offers no explanation as to why this statute does not enjoy the presumption of constitutionality that other statutes enjoy, or why CPSRTA did not have to wait for a court to rule on the statute's constitutionality. It instead simply pretends that RCW 82.44.035 might apply in the future, or to some other entity, but not to CPSRTA. Not content with claiming that it was *permitted* to continue calculating its MVET as though RCW 82.44.035 did not exist, CPSRTA argues that it was positively *required* to continue using the schedule in force at the time the bonds were issued.[8] According to CPSRTA, it need not bring a

[8] Interpreting *Pierce County II*, CPSRTA claims: "[T]he Supreme Court held that Sound Transit was constitutionally

court challenge to this new law, nor give the Attorney General the opportunity to defend the statute against a constitutional challenge, nor wait for confirmation of its belief as to its duty to comply with RCW 82.44.035.[9] It could simply assume that the statute would be judged unconstitutional.

CPSRTA's view of RCW 82.44.035, and the trial court's acquiescence in this belief, upends the rule that "a party challenging a statute's constitutionality bears the heavy burden of establishing its unconstitutionality." *Pierce County II*, 159 Wash. 2d at 27. It also relieves CPSRTA of the burden of satisfying the three part test for showing impairment of a public contract: (1) does a contractual relationship exist; (2) does the

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required to use the Referendum 49 Schedule until its 1999 bonds retire." CPSRTA Brief iso SJ, 4:24-25.

[9] To date, the Attorney General has not taken any position on the constitutionality of the various statutes at issue here. It has taken no steps to compel CPSRTA to comply with the statutory valuation tables that CPSRTA, and by its silence, the Attorney General, argue are in force.

legislation substantially impair the contractual relationship; and (3) if there is substantial impairment, is it reasonable and necessary to serve a legitimate public purpose. *Tyrpak v. Daniels*, 124 Wash. 2d 146, 153 (1994).

It is difficult to overstate the significance of CPSRTA's novel interpretation of the constitutional prohibition against impairment of contracts. If the enforceability of a statute depends upon whether the statute would have a negative effect on future tax revenue pledged to existing contractual obligations, without the need to seek judicial adoption of a claim of impairment, the authority of legislatures will suffer a serious blow. Moreover, such a rule would incentivize governmental entities like CPSRTA to protect their revenue streams from any future reduction by immediately pledging them to the service of indebtedness. While CPSRTA is free to alter its practices in light of changing circumstances, the legislature, according to

CPSRTA, is not.[10] As discussed in the next section, CPSRTA's interpretation of the contracts clause is completely contrary to the application of the contracts clause not only in our own state but particularly in federal courts.

C. Consistency Between Interpretation of the Contracts Clauses of the State and Federal Government Should Be Retained.

As noted above, the view of the state constitution's contracts clause advanced by CPSRTA and adopted by the trial court would effect a major departure from previous applications of both the federal and state constitutional prohibitions against impairment of contracts. Even if CPSRTA and the trial court were persuasive in arguing that *Pierce County II* and *Black I* did in fact create this dramatic change, an explanation is required for the decoupling of the interpretation of the state contracts clause

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[10] CPSRTA appears to take this position only with respect to MVET valuation tables; it concedes that the Legislature permissibly can and has reduced the taxable base of its ***sales tax*** revenue, even though sales tax revenue is pledged to the same bonds as the MVET.

from the way in which courts across the country have interpreted Article I, § 10 of the federal constitution. As recently as *Kellogg v. National Railroad Passenger Corporation,* 199 Wash. 2d 205, 227 (2022)—long after the issuance of the opinions in *Pierce County II* and *Black I*—the Washington Supreme Court affirmed: "We have treated the Washington Constitution's contracts clause as coextensive with the federal constitution's contracts clause . . ." *See also Department of Labor and Industries of State v. Lyons Enterprises, Inc.*, 186 Wash. App. 518 (2015) (quoting *Pierce County II* for the principle that the state and federal contracts clauses are co-extensive); *Washington Educ. Ass'n v. Washington Dep't of Ret. Sys.*, 181 Wash. 2d 233, 242 (2014), *Sloma v. Washington State Department of Retirement Systems*, 12 Wash. App. 2d 602 (2020).

Federal courts' application of the federal contracts clause is, to date, entirely consistent with this Court's application of the state contracts clause, including in *Pierce County II*. CPSRTA's

interpretation of *Pierce County II*, by contrast, completely divorces the state contracts clause from its federal counterpart. Specifically, all other state contracts clause cases have followed the federal rule that "a State does not violate the Contract Clause if its challenged action does not change the legal enforceability of the contracts, a condition a State satisfies so long as it does not purport to relieve a party—including, most especially, itself—of its duty either to perform or to submit to a court-ordered remedy." *Pure Wafer Inc. v. Prescott, City of*, 845 F.3d 943, 952 (9th Cir. 2017) (cleaned up). This reaches the second prong of the three-part test for impairment under the state contracts clause: does the state action "substantially impair" the contract? CPSRTA could never carry its burden of showing that a reduction in taxable base, tax rate, or valuation schedules necessarily impairs a bond contact to which that revenue is pledged. First, the Legislature has repeatedly done exactly that to these very bonds—with no objection from CPSRTA—when it

changed the basis upon which the sales tax is calculated. CPSRTA cannot explain why it acquiesced in the Legislature's change in the sales tax, but did not even bother to comply with or challenge the Legislature's adjustment of the method by which the MVET is calculated. Second, no federal or state case ever held that a tax cut by itself impairs a contract, not even a bond contract to which that tax is pledged as a security.

Instead, virtually every major state contracts clause case tracks the federal rule, and requires the challenging party not simply to prove that the change results in lower tax revenue, but results in a *substantial impairment* of its ability to perform its contractual duties. For example, in *Tyrpak*, the bondholders were induced to invest when the law set the boundaries and taxable land area of the Port which issued bonds. A later law allowed a different municipality to take the Port's land. At the moment the case was filed and decided, just a little bit of land had been taken, and the taxable base remaining was sufficient to generate tax

revenue to pay the bonds. No matter: the financial framework that induced investment was not merely revenue and payoff, but *security*. The lawsuit did not challenge the mere ***transfer*** of the minimum amount of land, but the ***changed law*** that altered the financial framework that was in place when the parties entered into the financial obligations of lender and creditor. In that, the law was akin to eliminating the mortgage lien on a home. Whether the homeowner has the income and intention to pay the debt does not matter; the bank loaned money in exchange for both security and payment, not payment with no security, or a security that can be given away bit by bit.

In *O'Brien*, a virtually identical situation arose as in *Tyrpak* and *Pierce County II*. Tax revenue was diverted from Metro, the bond issuer, and replaced with "an assumption that the state will appropriate funds to cover debt service." *Municipality of Metro. Seattle v. O'Brien*, 86 Wash. 2d 339, 351 (1976). The bondholders bought a security interest, where the municipality bound itself to

collect and remit tax revenue to pay the incurred debt. The new law would have dissolved that security, and given the bondholders an unsecured IOU premised on future legislative action to pay the formerly secured debt. But they had not lent money on the promise of future appropriations, and whether or not any payment had been missed made no difference to the court. Following the federal rule, in the very cases that CPSRTA ignores, the Supreme Court held in both *Tyrpak* and *O'Brien* that the contracts were impaired without yet being breached—just as, under both contracts clauses, state and federal, contracts can also be breached without being impaired. *Ruano v. Spellman* presents an identical fact pattern: The bonds were backed by a covenant of specific tax revenue, but the challenged law "would repeal the very authority by which the bonds were issued. Intertwined with that is the substantial doubt cast upon the special excise tax which had been irrevocably committed to payment of the principal of and interest on the bonds." *Ruano v. Spellman*, 81 Wash. 2d 820,

826 (1973). Just as in every other case cited by CPSRTA, including *Pierce County II*, the contracts were impaired even without any payment ever being missed, and without certainty that a payment could or would not be made, because the challenged law deleted the legal basis of the security, the financial framework on which the parties bargained. Not one of the cases cited found impairment merely from reducing revenue. *Pierce County II* is no different, and, as this Court recognized in its ruling in that case, continues to follow the federal rule, as stated, for example, in *Pure Wafer*: "[S]state action cannot be said to 'impair' the obligation of a contract so long as it leaves both parties free to obtain a court-ordered remedy (typically damages) in the event that either of them fails to perform as promised." *Pure Wafer*, 845 F.3d at 951. *Pierce County II* found I-776 unconstitutional where the effect of the initiative was to repeal the statute creating one of the bondholders' remedies for breach, by eliminating the entire MVET revenue stream and the

associated tax account, the very account that the bond contract made available as the court-ordered remedy for breach.[11]

If CPSRTA's view of *Pierce County II* and *Black I* were adopted, Washington law would be sharply at odds with the way in which the parallel provision in Art. I, section 10 of the federal constitution has been applied. Instead, a much higher threshold must be reached before a court strikes down legislative adjustments to tax rates and methods for property valuation.

Just like its argument regarding res judicata, CPSRTA's interpretation of the contracts clause asserts a substantially broader application of the doctrine without explaining any limiting principle that could narrow its scope.

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[11] Undoubtedly, reducing the valuation schedules to zero, or reducing the MVET tax rate to zero, could impair the bond contracts by zeroing out the tax diverted in the dedicated account established as the bondholders' remedy. But CPSRTA has made no attempt to show that any specific lesser reduction in future rates would have the effect of limiting, much less eliminating, the breach remedy.

D. CPSRTA Is Not Entitled To The Equitable Remedy of the Statute Of Limitations.

In its ruling, the trial court applied the statute of limitations to some,[12] but not all, of Plaintiffs' claims. If this court reverses the trial court's determination that res judicata does not bar *all* of Plaintiffs' claims,[13] then this case should be remanded to the trial court for further proceedings.

Even partial summary judgment should not have been granted with respect to the claims identified in the trial court's order, because there were outstanding issues that had not been resolved as to whether the statute of limitations or some other doctrine should be applied.

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[12] The trial court's order granting summary judgment identifies Claims 1, 2-6, 8 and 16-17 as being "alternatively precluded by the applicable three-year statute-of-limitations" or were "time-barred." CP 1152.

[13] "The doctrines of collateral estoppel and res judicata bar further litigation of Claims 1-19 . . . . Claims 1-19 are therefore dismissed with prejudice." CP 1152.

Application of the statute of limitations requires a consideration of equitable principles. *Lybbert v. Grant County,* 141 Wash. 2d 29 (2000). In addition, a cause of action for misconduct by the government is often subject to the discovery rule. *Flynn v. Pierce County*, 16 Wn. App. 721 (Div. 2 2021).

In answer to CPSRTA's defense of the statute of limitations, Plaintiffs raised two arguments: first, the discovery rule applied to determine when the various causes of action accrued; and second, CPSRTA's unclean hands required the application of the "equitable tolling" principle recognized in *Millay v. Cam*, 135 Wash. 2d 193 (1998). Both principles apply here.

As to the discovery rule, both defendants—the government entities charged with implementing the MVET—have claimed that up to the morning of Supreme Court oral argument in *Black I*, in September 2019, they had no idea that they were not following the governing law. No member of the

public can properly be charged with knowledge that the expert defendants say they lacked so as to trigger the statute of limitations.

Furthermore, CPSRTA's unclean hands disentitle it to any equitable relief. "From ancient times, the first maxim in equity has been that one who seeks equity must do equity. . . Of similarly ancient provenance is the requirement that those who come into equity must come with clean hands." *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wash. 2d 566, 581 (2013) (internal citations and alterations omitted). CPSRTA knowingly refuses to comply with the very statute as to which it seeks relief. According to CPSRTA, it has never paid any attention at all to RCW 82.44.035. According to CPSRTA, it considered that the law was never intended to govern its conduct despite the explicit statutory text to the contrary. Therefore, it elected to ignore it. And, it claims it had no hand at all in drafting the 2010 "technical amendment," a text that very tellingly went further than was

required to merely bring the code into alignment with *Pierce County II*. Even though the 2010 law requires use of 1996 valuation schedules for ST1, CPSRTA taxed along for years using 1999 schedules, supposedly never noticing that it didn't follow the law. Its general counsel has acknowledged drafting the 2015 ST3 MVET language, a verbatim copy of the 2010 Technical Amendment. CPSRTA repeatedly told this Court and the Supreme Court that the 2015 ST3 MVET language was crystal clear, unambiguous, and plainly comprehensible to anyone. It was finally forced to acknowledge that it has never followed that clear, plain, unmistakable mandate, despite having made repeated assurances, under oath, to this Court, through the declarations of senior executives, that it had always followed the statute. Yet, today, almost three years later, it still refuses to follow the governing law, insisting on its unilateral right to give tax breaks to owners of newer cars despite explicit legislative text

to the contrary. CPSRTA's ongoing lawbreaking disentitles it to any equitable relief.

V. CONCLUSION

Appellants Joshua Penner et al. respectfully request that this Court decline the invitation to expand the reach both of res judicata and the constitutional prohibition on impairment of contracts. This court should reverse the judgment of the Pierce County Superior Court and remand this case for further proceedings.

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Submitted this June 27, 2022.

ARD LAW GROUP PLLC

By: _____
Joel B. Ard, WSBA # 40104
P.O. Box 11633
Bainbridge Island, WA 98110
Phone: (206) 701-9243
Attorneys for Plaintiffs

ALBRECHT LAW PLLC

By: _____
David K. DeWolf, WSBA #10875
5105 Third Ave., Suite 101
Spokane Valley, WA 99212
Phone: (509) 495-1246
Attorneys for Plaintiffs

RAP 18.17(b) Certification

I hereby certify that the foregoing brief contains fewer than 12,000 words (RAP 18.17(c)(2)), specifically 5840 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images, as calculated using Microsoft Word, the word processing software used to prepare this brief.

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Ard Law Group PLLC

By: _____

Joel B. Ard, WSBA # 40104
P.O. Box 11633
Bainbridge Island, WA 98110
Phone: (206) 701-9243
Attorneys for Plaintiffs

Albrecht Law PLLC

By: _____

David K. DeWolf, WSBA #10875
5105 Third Ave., Suite 101
Spokane Valley, WA 99212
Phone: (509) 495-1246
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the United States of America that on June 27, 2022, I filed the foregoing Opening Brief of Appellants, Case No. 100758-2, through the Washington State Appellate Courts' Secure Portal which gives electronic notice of the filing to all active parties on the case.

ARD LAW GROUP PLLC

By: _____
Joel B. Ard, WSBA # 40104
P.O. Box 11633
Bainbridge Island, WA 98110
Phone: (206) 701-9243
Attorneys for Plaintiffs

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ARD LAW GROUP PLLC

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- desmond.brown@soundtransit.org
- jacob.zuniga@pacificalawgroup.com
- lalseaef@atg.wa.gov
- mattelyn.tharpe@soundtransit.org
- mevans@trialappeallaw.com
- paul.lawrence@pacificalawgroup.com
- thien.tran@pacificalawgroup.com

Comments:

Sender Name: Joel Ard - Email: joel@ard.law
Address:
PO BOX 11633
BAINBRIDGE ISLAND, WA, 98110-5633
Phone: 206-701-9243

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